Supreme Court, U.S.
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No. 95-1228

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

JERRY E. WELLS
and
KENNETH R. STEELE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE GOVERNMENT IS PRECLUDED FROM RAISING ITS ARGUMENT THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHEN THE INDICTMENT IN THIS CASE CHARGES MATERIALITY AS AN ELEMENT OF THE OFFENSE, THE JURY INSTRUCTIONS OFFERED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED THE ELEMENT OF MATERIALITY, AND THE GOVERNMENT DID NOT OBJECT OR OTHERWISE SUBMIT TO THE DISTRICT COURT THAT MATERIALITY IS NOT AN ELEMENT OF SECTION 1014.

II. WHETHER THE COURT OF APPEALS BELOW ERRED IN RECOGNIZING THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED STATES v. GAUDIN*, 115 S. CT. 2310 (1995).

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ON PETITION FOR WRIT OF CERTIORARI
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RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents Jerry E. Wells and Kenneth R. Steele oppose the United States' Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The Respondents accept the Petitioner's version of the Opinion Below as set forth in the Petition for a Writ of Certiorari.

JURISDICTION

The Respondents accept the Petitioner's version of Jurisdiction as set forth in the Petition for a Writ of Certiorari.

STATUTORY PROVISION INVOLVED

The Respondents accept the Petitioner's version of the statutory provision involved as set forth in the Petition for a Writ of Certiorari.

STATEMENT

The Respondents in this case were each charged by Indictment in the United States District Court for the Western District of Missouri with one count of conspiracy to make material false statements to a financial institution in violation of 18 U.S.C. § 371, and four counts of making material false statements to financial institutions in violation of 18 U.S.C. § 1014. Defendants pleaded not guilty to all charges. Before the trial in this cause, one false statement count was dismissed by the district court for failure to state an offense. Following the close of all the evidence, the district court granted judgments of acquittal on two other false statement counts.

After its deliberations, the jury returned verdicts of guilty on the conspiracy to make false statements to a financial institution count and on the remaining false statement count. Each Respondent was sentenced to a term of two years probation. On appellate review, the Eighth Circuit Court of Appeals vacated the convictions and remanded the case for retrial in light of *United States v. Gaudin*, 115 S. Ct. 2310 (1995).

This case involved a photocopier sales, service, and leasing company that was purchased and owned by the Respondents and James Russell. After the purchase of this company, the Respondents and Russell renamed the company Copytech. Respondent Wells was chairman of the board and secretary of Copytech, and Respondent Steele was the CEO and vice president. James Russell had numerous years experience in the photocopy industry, and was responsible for the day-to-day operations of the business. Neither Respondent Wells nor Respondent Steele had any experience in the sales, leasing, or service of photocopier systems. Both Respondents initially relied on Russell to make all major business decisions regarding the company and its day-to-day operations. However, the Respondents became more actively involved in the company when Russell became emotionally disturbed and ill.

While working at the predecessor company to Copytech, Russell became familiar with a copier program that allowed the equipment, supplies, and service to be paid for by customers in one monthly payment. This program, called Copier Management Program or CMP, was also utilized by Copytech. To obtain funding due to a cash flow problem, Copytech obtained financing by selling its rights to the income under the lease agreements, but not its liabilities, to financial institutions.

The government's theory at trial was that the Respondents and James Russell conspired to withhold and conceal the fact that CMP was part of the lease contracts that were being purchased by financial institutions. The government's theory was that Copytech did not disclose its service obligations under the CMP agreement to the banks. Three overt acts were submitted to the jury. One of those acts alleged that the Respondents made false statements to banks by providing the banks with lease contracts that contained provisions that maintenance was the responsibility of the lessee and did not disclose its obligations under the CMP schedules. The second overt act alleged that James Russell made similar false statements to banks. The third overt act alleged that the Respondents had signed their wives' names to personal

guaranties to influence the bank in purchasing lease contracts. This overt act was also the substantive false statement count charged in Count II.

The government's evidence regarding the conspiracy rested almost entirely on the testimony of James Russell. Russell testified pursuant to a plea agreement he had previously entered into with the government wherein he pled guilty to three counts of bank fraud and conspiracy to commit bank fraud. Pursuant to the agreement, the government agreed to consider filing a motion for downward departure under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) for his substantial assistance in rendering testimony against the Respondents in this case.

Russell testified at trial that some banks wanted Copytech to keep a reserve fund to cover "soft costs" (costs to service equipment over and above equipment costs). Russell testified that prior to the purchase of Copytech and immediately thereafter, the company used separate lease contracts and separate CMP agreements. The lease contract did not reference the CMP agreement. However, Russell's testimony indicated that officials from one of the financial institutions involved in this case were provided an overview of CMP and even inspected lease files with CMP agreements included in those files. In addition, Copytech provided financial statements to the banks involved that contained an extensive description of its CMP program.

Russell testified that, to avoid the "soft costs" reserve, Copytech altered its lease agreement to state that the lessee was responsible for maintenance and then the CMP agreement would be added as an addenda. Only the lease would be sent to the financial institutions. The Respondents at trial submitted, *inter alia*, that the omission of the CMP agreement was not material.

The Respondents were also convicted of violating 18 U.S.C. § 1014 by signing their wives' names to personal

guaranties.[1] At trial, the Respondents claimed that the statements were not false because they had or believed they had their wives' authority and because the signatures were not material. The issue of materiality was a critical aspect of both counts submitted to the jury.

After all the evidence was adduced at trial, the district court ruled that the remaining false statements in question were material. At this time, the Respondents argued that materiality should be an issue submitted to the jury.[2] Thus, this issue was properly preserved by the Respondents. *(See* Petitioners' App. at 7a n.3.) When the district judge ruled on materiality issues, the government did not argue, suggest or submit that materiality is not an essential element of 18 U.S.C. § 1014.

The Respondents appealed their convictions to the Eighth Circuit and the government cross-appealed on several sentencing issues. In its initial brief on appeal, the government did not raise the issue that materiality is not an element of 18 U.S.C. § 1014. The government consistently acknowledged in its brief that materiality is an element of § 1014; that the government met its burden at trial of proving that the statements at issue were material; and that the district judge acted appropriately in ruling that those statements were material.

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1. The evidence at trial through the testimony of James Hayes, former chairman of O'Bannon Bank, indicated that Regulation B of the Code of Banking Regulations prohibited financial institutions from requiring the signature of an applicant's spouse other than on a joint application for credit transaction.

2. In ruling on the issue of materiality, the district court judge was also of the opinion that materiality should be submitted to the jury (Petitioners' App. at 8a, n.4). However, the judge felt bound by then-controlling Eighth Circuit law which required him to determine materiality. (*Id.*)

During the pendency of the appeal to the Eighth Circuit, this Court handed down the decision of *United States v. Gaudin*, 115 S. Ct. 2310 (1995). In light of *Gaudin*, the Eighth Circuit requested supplemental briefing by the parties. Only after this Court's decision in *Gaudin* and the Eighth Circuit's request for additional briefing did the government raise its argument that materiality is not an essential element of 18 U.S.C. § 1014.

In its decision below, the Eighth Circuit correctly recognized that materiality has been held to be an element of Section 1014 by most courts, and has traditionally been a matter of law for the judge to decide (Petitioners' App. at 7a). Since the court held that materiality was an element of Section 1014, the Eighth Circuit reversed and remanded this case in light of the *Gaudin* decision which requires that materiality should be submitted to the jury.

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REASONS FOR DENYING THE PETITION

I. WHETHER THE GOVERNMENT IS PRECLUDED FROM RAISING ITS ARGUMENT THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHEN THE INDICTMENT IN THIS CASE CHARGED MATERIALITY AS AN ELEMENT OF THE OFFENSE, THE JURY INSTRUCTIONS OFFERED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED THE ELEMENT OF MATERIALITY, AND THE GOVERNMENT DID NOT OBJECT OR OTHERWISE SUBMIT TO THE DISTRICT COURT THAT MATERIALITY IS NOT AN ELEMENT OF SECTION 1014.

The Indictment in this case charged materiality as an element of the false statement charge in Count II.[3] Furthermore, Jury Instruction 20, which was offered by the government and submitted to the jury, contains a definition of when a statement is false that includes materiality.[4] The instruction goes on to state that materiality is not a matter for the jury to determine (Petitioner's App. at 22a). In addition, Instructions 15 (the conspiracy instruction) and 18 (defined false statements for conspiracy) reference materiality.[5] The

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3. Count II charged in relevant part: "[D]efendants Jerry E. Wells and Kenneth R. Steele knowingly made and caused to be made false statements of *material fact* to O'Bannon Bank . . ." (emphasis added).

4. Instruction 20 stated in relevant part: "A statement or representation is 'false' when it is untrue when made or effectively conceals a *material* fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction." (Petitioner's App. at 22a.)

5. The conspiracy instructions included several references to materiality, but the substantive false statement instruction told the jury to disregard the issue of materiality. This also created error because the object

Indictment and the jury instructions were consistent with the well-established law that § 1014 requires a false statement of *material fact*. *See, e.g., United States v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (Section 1014 requires that the false statement regard a material fact).

Since the Indictment in this case charged materiality as an element of the offense and the government's instructions also contained materiality, the government is precluded by the "invited error" doctrine from claiming that materiality is not an element of § 1014. Under the invited error doctrine, a party is precluded from arguing on appeal those errors which he invited or provoked the court below to commit. *See, e.g., United States v. Sharpe*, 996 F.2d 125 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 400 (1993); *United States v. Schnurstein*, 977 F.2d 449 (8th Cir. 1992); *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *United States v. Ward*, 914 F.2d 1340 (9th Cir. 1990). Under this doctrine, the government cannot charge materiality in the Indictment, offer instructions that include materiality and then argue to this Court that it is entitled to relief on the materiality issue. *See also United States v. Johnson*, 26 F.3d 669 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 344 (1995).

Additionally, since the grand jury charged materiality as an element of the offenses in the Indictment, the government was required to prove materiality in this particular case. *Cf. United States v. Camp*, 541 F.2d 737, 740 (8th Cir. 1976) (citing *Ex Parte Bain*, 121 U.S. 1 (1887); *Stirone v. United States*, 361 U.S. 212 (1960). In *Camp*, the Eighth Circuit stated that the defendant has a constitutional right to be tried upon charges found by a grand jury. *Id.* The words of the Indictment evidence whether the grand jury considered and included the essential element of materiality. *Cf. Camp*, 541 F.2d at 740. In this particular case, the grand jury considered and included

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though materiality was referenced in the conspiracy instructions. *See Griffin v. United States*, 112 S. Ct. 466, 473 n.2 (1981) (citing *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982)).

essential element of materiality. *Cf. Camp*, 541 F.2d at 740. In this particular case, the grand jury considered and included materiality as an element of the offenses charged and thus, the government is precluded from raising the argument that materiality is not an element.

In addition to the Indictment and jury instructions, the government failed to make any objection or record submitting that materiality should not be an issue or element under 18 U.S.C. § 1014 when the court was ruling on the issue of materiality. Plus, the government's initial brief on appeal consistently alleges materiality is an element of 18 U.S.C. § 1014; was properly proved at trial; and that the judge acted appropriately in holding that the statements were material. Once the Eighth Circuit requested additional briefs in light of *Gaudin*, the government took its contrary position regarding materiality. To raise its argument regarding materiality at this stage of the proceedings went well beyond what the Eighth Circuit requested in the additional briefs that were allowed.

A principle rule of appellate procedure is that when a litigant fails to raise a challenge timely, or concedes an issue below, it cannot be raised in later proceedings. *See, e.g., Steagald v. United States*, 451 U.S. 204, 208-09 (1981); *Pembaur v. City of Cincinnati*, 882 F.2d 1101, 1106 (6th Cir. 1989); *United States v. Morales*, 737 F.2d 761, 763 (8th Cir. 1984). Counsel cannot remain silent, let the claimed error take place, and then object to the error later. *United States v. Carr*, 965 F.2d 408 (7th Cir. 1992). *See also United States v. Thompson*, 811 F.2d 841, 843 (5th Cir. 1987) (jury instruction that contained materiality in a § 1014 prosecution was permissible because materiality has been recognized as an element, and the government did not object to the jury instruction). The government below had ample opportunity to present its argument regarding materiality. Additionally, the government had the opportunity to discuss this issue in its initial brief before the appellate court. The government should not now be able to take a contrary position.

II. WHETHER THE COURT OF APPEALS BELOW ERRED IN RECOGNIZING THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED STATES v. GAUDIN*, 115 S. CT. 2310 (1995).

The Petition should also be denied because the opinion below, upon which the Respondents rely, is consistent with this Court's holding in *Gaudin* and its actions in subsequent cases. The *Gaudin* decision involved 18 U.S.C. § 1001, which criminalizes making material false statements in a matter within the jurisdiction of a federal agency.[6] The parties in the *Gaudin* case agreed that materiality was an element of the offense under § 1001 in light of the well-established case law construing § 1001. *See Gaudin*, 115 S. Ct. at 2313.[7] The issue addressed by this Court was whether the jury or the judge should determine materiality.

This Court held that criminal convictions must rest on a jury determination that the defendant is guilty of every element of the crime beyond a reasonable doubt. *Gaudin*, 115 S. Ct. at 2313. Justice Scalia wrote that a defendant's Sixth Amendment right to a jury trial mandates that the jury determine

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6. 18 U.S.C. § 1001 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both."

7. It should be noted that while the first phrase creating a violation of § 1001 uses the word "material" as an adjective to qualify the word "fact," "material" is not used in the second phrase creating a violation of § 1001. The statutory language which identifies a violation of § 1014 parallels the language of the second phrase of § 1001.

whether the element of materiality has been established. *Id.* Thus, *Gaudin* requires that materiality under Section 1001 must be submitted to the jury. After the *Gaudin* decision, this Court has granted certiorari, vacated the judgment, and remanded several cases for further consideration in light of *Gaudin*. *See, e.g.*, *Knapp v. United States*, 116 S. Ct. 666 (1995) (conviction involving the filing of false currency transaction reports was remanded in light of *Gaudin); Daughtry v. United States*, 116 S. Ct. 510 (1995); *Gatewood v. United States*, 116 S. Ct. 510 (1995) (conviction for making a false statement to the Navy was remanded in light of *Gaudin*); *Waldron v. United States*, 116 S. Ct. 333 (1995) (conviction under 18 U.S.C. § 1014 for making a false statement to HUD was remanded in light of *Gaudin*); *Porat v. United States*, 115 S. Ct. 2604 (1995) (conviction under 18 U.S.C. § 1623, which prohibits making a false declaration before the grand jury, was remanded in light of *Gaudin*). The *Waldron* case involved the same statute involved in this case, 18 U.S.C. § 1014.

In the decision below, the Court of Appeals correctly recognized that materiality has long been recognized as an element under 18 U.S.C. § 1014 (Petitioner's App. at 12a). *See also United States v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (Section 1014 requires that the false statement concern a material fact); *United States v. Spears*, 49 F.3d 1136, 1141 (6th Cir. 1993) (the government must prove that the defendant knowingly made a false statement of material fact); *United States v. Ryan*, 828 F.2d 1010, 1013-14 (3rd Cir. 1987). Moreover, the Eighth Circuit recognized that similar fraud statutes like 1014, which do not explicitly list materiality in the definition of the crime, nevertheless have been found to require materiality as an element of proof. *See* Petitioner's App. at 10a (*citing United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980).[8]

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8. In *Adler*, the court held that although 18 U.S.C. § 1001 does not on its face limit its coverage to false statements which are material, materiality is an element of the offense. *United States v. Adler*, 623 F.2d 1278, 1291 (8th Cir. 1980). Further, the *Adler* court stated that it saw no reason to treat Section 1001 any differently than 18 U.S.C. § 287. *Id.*

The Eighth Circuit below saw no reason to treat Section 1014 differently than similarly worded false statement statutes, like § 1001 (Petitioner's App. at 12a). Thus, the Eighth Circuit has explicitly adopted the rule that numerous other courts have previously adopted, materiality is an essential element of § 1014. *Id.*

The government asserts in its Petition that there is a "long-standing conflict between the circuits" regarding materiality as an essential element of 18 U.S.C. § 1014 (Petition at 8). Yet, the only case cited in the government's Petition in support of its argument is the 1977 Second Circuit opinion of *United States v. Cleary*, 565 F.2d 43, 46 (2d Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). The *Cleary* decision rejected an argument on appeal that the trial court erred in failing to instruct the jury that the statements made were false as to a material matter. *Cleary*, 565 F.2d at 46. In its decision, the *Cleary* court quoted a previous Second Circuit decision which had rejected the argument that reliance by the bank on the statements is an element under Section 1014. *United States v. Sabatino*, 485 F.2d 540, 574 (2d Cir. 1973). The *Cleary* court quoted *Sabatino* by stating that "[i]t does not lie with one knowingly making false statements . . . to say that the statements were not influential or the information not important." *Cleary*, 565 F.2d at 46 (*quoting Sabatino*, 485 F.2d at 574). The opinion goes on to state that "[i]n any event, any question of materiality would be for the court, not the jury." *Cleary*, 565 F.2d at 46. Thus, the Second Circuit was undecided as to whether materiality should not be an element of Section 1014, or whether materiality is an element but should be determined by the court.

As acknowledged in the government's Petition, nearly all other circuits have held that materiality is an essential element of § 1014 (Petition at 12). Respondents respectfully submit that in light of the fact *Cleary* was decided some time ago, coupled with the fact that the *Cleary* opinion is not clearly decisive as to this issue, there is no "long-standing" or substantial conflict among the circuits regarding the issue of materiality.

The government also argues that the provision of § 1014, which requires that the statement be made "for the purpose of influencing in any way the actions" of a covered institution, somehow forecloses or precludes a materiality requirement. The government states that if statements are made for the purpose of influencing actions of a covered institution, the statements must be material because immaterial statements would not influence the banks. Thus, the government concedes materiality is an element of the offense, but still argues materiality qualifies "purpose of influencing" but not the statements themselves. How can that be? The "purpose of influencing" language in § 1014 places emphasis on the defendant's intent, while materiality looks to the actual statements made. It is possible that a defendant could make a trivial or harmless statement with the purpose or intent to influence the bank's decision. The importance of this distinction was discussed in *United States v. Staniforth*, 971 F.2d 1355 (7th Cir. 1992). Writing for the Seventh Circuit, Judge Posner determined that materiality prevents the statute from punishing harmless or trivial attempts. *See Staniforth*, 971 F.2d at 1358. Without materiality, Judge Posner felt that the potential reach of § 1014 would be greatly expanded with few benefits. *Id.* Such an expansion of § 1014, without materiality, would lead to unnecessary litigation for trivial or immaterial statements made, and would violate the interests of justice. The Seventh Circuit, along with most other federal circuits, recognize the importance of the materiality requirement. Further, these courts recognize that although materiality is not explicitly listed in the various fraud statutes, it is not error for courts to require materiality as an element of proof. *See, e.g., Staples v. United States*, 114 S. Ct. 1793 (1993).

Finally, the government's reliance on *Kay v. United States*, 303 U.S. 1 (1938), is misplaced. *Kay* involved a predecessor statute to § 1014, 12 U.S.C. § 1467(a) (1933), which prohibited making a false statement or willfully overvaluing any security for the purpose of influencing the Home Owner's Loan Corporation. *See Kay*, 303 U.S. at 3 n.1. In *Kay*, the petitioner argued that the statements would not have directly influenced any loan made by the corporation. This

Court held that one charged with making a false statement cannot claim that statements were not influential or the information not important. *Kay*, 303 U.S. at 5-6. However, the *Kay* decision was pronounced in 1938 and involved a different statute. Further, at the time of the *Kay* opinion, there was not a breadth of case law from nearly all circuits analyzing and specifically adopting materiality as an important and necessary element of 18 U.S.C. § 1014.

The government has not demonstrated that there is an articulable or substantial conflict among the circuits regarding materiality. Additionally, the government is precluded from raising this issue at this stage in the proceedings. Thus, no reason exists for this Court to grant the Petition for a Writ of Certiorari in this case.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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